No. 82-1639

In the Supreme Court of the United States

OCTOBER TERM, 1982

CARLOS MARCELLO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals abused its discretion in denying petitioner's motion to reopen his deportation hearing in order to apply for relief under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), where petitioner failed to establish a reasonable likelihood that his application for such relief would be granted as a matter of discretion.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 694 F.2d 1033. The opinion of the Board of Immigration Appeals (Pet. App. 8a-13a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1983 (Pet. App. 7a). The petition for

a writ of certiorari was filed on April 6, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

8 U.S.C. 1182(c) provides in relevant part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) to (25), (30), and (31) of subsection (a) of this section.

8 U.S.C. 1251(a)(11) provides in relevant part:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
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> * * * * *
>
> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana * * *.

8 U.S.C. 1254(a)(2) provides:

> (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the

Attorney General for suspension of deportation and— * * * * *

(2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 1251(a) of this title; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

STATEMENT

1. Petitioner was born in Tunis, Africa, on February 6, 1910, of Italian parents. Eight months later, he was admitted to the United States for permanent residence. In 1953, petitioner was ordered deported under Section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(11), on the basis of a 1938 conviction for a marijuana violation (Pet. App. 1a). Although the deportation order was affirmed in *Marcello* v. *Aherns*, 212 F.2d 830 (5th Cir. 1954), and *Marcello* v. *Bonds*, 349 U.S. 302 (1955), it was not executed until 1961. *United States ex rel. Marcello* v. *District Director*, 634 F.2d 964, 966, 977 (5th Cir. 1981).[1]

[1] A chronology of petitioner's extensive attempts to avoid deportation during the period 1953 through 1961 is set forth

Petitioner reentered the United States without inspection in May 1961, and a second deportation proceeding was initiated on the basis of this illegal reentry, as well as his 1938 marijuana conviction. Later that year, petitioner was ordered deported on those charges, and the Board affirmed the deportation order and denied voluntary departure. *United States ex rel. Marcello* v. *District Director, supra*, 634 F.2d at 966, 977.

In 1972 petitioner moved to reopen his deportation proceedings in order to apply for suspension of deportation under Section 244(a)(2) of the Act, 8 U.S.C. 1254(a)(2).[2] Although the Board granted

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in an appendix to the Fifth Circuit's opinion in *Marcello* v. *District Director, supra*, 634 F.2d at 974-976.

In 1961 petitioner was deported to Guatemala. Petitioner contends (Pet. 9-14) that this deportation was unlawful because it was effected pursuant to a Guatemalan birth certificate that the INS must have known was a forgery and because the INS failed to give him or his attorney adequate notice of the execution of the deportation order. The legality of petitioner's 1961 deportation to Guatemala, however, is not properly before the Court. Because the Board denied petitioner's motion to reopen his deportation proceedings in order to apply for relief under 8 U.S.C. 1182(c) as a matter of *discretion*, the legality vel non of petitioner's 1961 deportation, which bears only on his statutory *eligibility* for relief under 8 U.S.C. 1182(c), is irrelevant. The Board is not required to rule on whether an alien is statutorily eligible for relief when such relief is denied as a matter of discretion. *INS* v. *Bagamasbad*, 429 U.S. 24 (1976).

[2] Petitioner twice previously had attempted to reopen the 1961 order of deportation. In 1963, he moved to reopen in order to challenge the validity of his 1961 deportation to Guatemala. The Board denied that motion as premature, without prejudice to its resubmission at a later date. See 634 F.2d at 977.

In 1970, petitioner again moved to reopen deportation proceedings for the purpose of establishing that his 1961 depor-

petitioner's motion to reopen, in 1976 it denied petitioner's application for suspension of deportation both as a matter of statutory ineligibility and as a matter of discretion (see majority opinion for the Board, *reprinted at* 634 F.2d 977-979). In so doing, the Board expressly did not consider the legality of petitioner's 1961 deportation and subsequent reentry. *Id.* at 978. Rather, the Board held (*id.* at 978-979) that petitioner's criminal record, in particular his 1968 conviction for assaulting an FBI agent, in violation of 18 U.S.C. 111, prevented him from satisfying the "good moral character" criterion of eligibility for relief under Section 244(a)(2). In the alternative, the Board held (634 F.2d at 979) that

> [e]ven if [petitioner] were able to establish statutory eligibility for suspension of deportation, we would still deny such relief in the exercise of discretion. There is no doubt that [petitioner's] deportation would result in some hardship to him and to his family. Nevertheless, we believe that [petitioner's] longstanding criminal record, his imprisonment, and his gambling activities, combined with his lack of character reformation, outweigh the hardship to [petitioner] and his family. [Petitioner] has failed to establish that he merits a favorable exercise of discretion.

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tation to Guatemala was illegal. The court of appeals dismissed as moot petitioner's appeal from the Board's denial of his motion. *Marcello* v. *INS*, 449 F.2d 349 (5th Cir. 1971). The court noted (*id.* at 350) that because, by the time of its disposition of the case, petitioner had been a resident of the United States for 10 years since his 1961 deportation and reentry, his application for suspension of deportation could be disposed of by the Board without resolution of the legality of the events of 1961.

The United States District Court for the Eastern District of Louisiana vacated the Board's decision on the grounds that the Board had erred in finding that petitioner lacked good moral character and that its denial of suspension of deportation as a matter of administrative discretion was an abuse of that discretion. *Marcello* v. *District Director*, 472 F. Supp. 1199 (1979). That decision, however, was reversed on appeal, 634 F.2d 964 (5th Cir.), and this Court denied a petition for a writ of certiorari, 452 U.S. 917 (1981).

2. Petitioner filed the instant motion to reopen his deportation proceedings, this time for the purpose of applying for relief under Section 212(c) of the Act, 8 U.S.C. 1182(c), on May 25, 1979, prior to either of the decisions in *Marcello* v. *District Director*, *supra*. Subsequent to the Fifth Circuit's decision in favor of the government in that case, the Board denied petitioner's motion (Pet. App. 8a-13a). The Board explained (*id.* at 11a-12a):

> In our last decision, considering the same favorable and adverse matters which would have been considered in determining whether relief was warranted the applicant under section 212(c), we concluded that the applicant had failed to establish that he was deserving of discretionary relief under section 244(a)(2). As noted above, we have found that [petitioner] has not alleged any significant changes of circumstances in the present motion to warrant reconsideration of this finding. Under these circumstances, we find that [petitioner] has not established that the proceedings should be reopened to allow him to apply for another form of relief which is also solely available if he can establish that he war-

> rants relief in the exercise of discretion. As [petitioner] has not made an adequate showing of likely success on the merits, his motion to reopen to consider an application for relief under section 212(c) is denied in the exercise of discretion.

As a "wholly separate" basis for denying the motion to reopen, the Board noted (Pet. App. 12a) that petitioner was under indictment for conspiracy, racketeering and fraud.[3] Although the Board concurred (*id.* at 12a) in petitioner's characterization of a grand jury indictment as an " 'accusation,' " it did not agree (*id.* at 12a-13a)

> that the accusatory nature of an indictment precludes it from being considered in the context of a motion to reopen where [petitioner] bears the burden of establishing that such proceedings should be reopened for further consideration of discretionary matters. In the context of the present case, where [petitioner] has once been denied discretionary relief in the exercise of discretion, we find that the serious, unresolved criminal indictment gives adequate cause to deny the motion to reopen in view of the further doubts raised regarding the present likelihood of success on the merits. [Petitioner] bears the burden of making a prima facie showing both of statutory eligibility for the relief sought and

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[3] Petitioner concedes (Pet. 15) that "[s]ubsequent to the decision of the Board, [he] was convicted of conspiracy in the United States District Court for the Eastern District of Louisiana, and of conspiracy to bribe a federal official in the United States District Court for the Central District of California."

> of a likelihood that discretion will be favorably exercised.

The court of appeals affirmed (Pet. App. 1a-6a). It first rejected (*id.* at 4a) petitioner's contention that the Board had impermissibly identified relief under Section 212(c) with suspension relief under Section 244(a)(2). Rather, the court explained (Pet. App. 4a),

> in determining whether there was a reasonable likelihood that discretionary relief under [S]ection 212(c) (waiver) would be exercised, the Board pointed out the strong and emphatically emphasized reasons that the Board had refused to exercise its similar discretion to afford [S]ection 244(a)(2) (suspension) relief.

The court saw (*id.* at 4a) "no error of law or discretion in the Board's so doing."

The court of appeals also found (Pet. App. 5a) no error or abuse of discretion in the Board's reasoning that the passage of time alone did not warrant reopening absent any significant change in a factor bearing on the disposition of the case. Finally, the court concluded (*id.* at 5a-6a) that the consideration given by the Board to the indictment then pending against petitioner did not amount to error since the Board did not deny petitioner's motion to reopen solely on the basis of the indictment. In addition, the court held (*id.* at 6a) that "to some extent the contention of impropriety in the Board's considering an indictment (accusation) is mooted by the admitted subsequent circumstance that since the Board's hearing [petitioner] was convicted of the crime charged by that indictment as well as of another offense."

ARGUMENT

The court of appeals correctly held that the Board did not abuse its discretion in denying petitioner's motion to reopen deportation proceedings in order to apply for relief under 8 U.S.C. 1182(c). That decision does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

1. Petitioner contends (Pet. 5-14) that the Board impermissibly identified relief under Section 244(a)(2) with relief under Section 212(c). As the court of appeals pointed out (Pet. App. 4a), however, petitioner's claim is based on a misreading of the Board's opinion. The Board never equated the statutory eligibility requirements for waiver relief under Section 212(c) with those for suspension of deportation under Section 244(a)(2). Rather, in passing upon petitioner's application for the discretionary relief afforded by Section 212(c), the Board concluded (Pet App. 11a-12a)—based on all the factors that it previously had considered in denying another form of discretionary relief, *i.e.*, suspension of deportation under Section 244(a)(2), and in view of the fact that there were no new factors—that it was unlikely that petitioner would be successful in establishing that he warranted a favorable exercise of discretion under 8 U.S.C. 1182(c). Accordingly, the Board denied petitioner's motion to reopen. See *In re Rodriguez-Vera*, 17 I. & N. Dec. 105 (BIA 1979). That ruling did not constitute an error of law or an abuse of discretion.

Petitioner is correct in contending (Pet. 6-9) that the statutory eligibility requirements for relief under Section 244(a)(2) are in some respects more stringent than those under Section 212(c) and that the

denial of relief under Section 244(a)(2) therefore is not dispositive of an application for relief under Section 212(c). See *In re M*, 5 I. & N. Dec. 598 (BIA 1954); *In re V-I-*, 3 I. & N. Dec. 571 (BIA 1949).[4] The fact that the requirements for *eligibility* for relief under the two provisions are different, however, does not mean that the Board is required to apply different standards when it determines whether to grant relief under the two provisions as a matter of *discretion*.

In *In re Marin*, 16 I. & N. Dec. 581, 584 (1978), the Board explained that in determining whether discretion should be exercised under Section 212(c), "[t]he immigration judge must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf." Among the factors considered adverse by the Board are "the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and

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[4] To be eligible for relief under Section 244(a)(2) an alien must show that he has been physically present in the United States for a continuous period of at least 10 years from the commission of an act constituting a ground for deportation, that during such period the alien has been and is a person of good moral character, and that his deportation would result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child who is a citizen of the United States or an alien lawfully admitted for permanent residence. 8 U.S.C. 1254(a)(2). By contrast, eligibility for relief under Section 212(c) requires a showing of lawful admission for permanent residence and lawful unrelinquished domicile of seven consecutive years from the time of admission for permanent residence. 8 U.S.C. 1182(c).

seriousness, and the presence of other evidence indicative of an [alien's] bad character or undesirability as a permanent resident of this country" (16 I. & N. Dec. at 584). Considerations deemed favorable by the Board include (*id.* at 584-585) "family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the [alien] was of young age), evidence of hardship to the [alien] and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to [the alien's] good character (e.g., affidavits from family, friends, and responsible community representatives)."

When the Board in 1976 considered and denied petitioner's application for suspension of deportation as a matter of administrative discretion, it considered many of the factors listed above. See 634 F.2d at 979. On balance, the Board concluded (*ibid.*) that although petitioner's deportation would result in some hardship to him and his family, his longstanding criminal record, his imprisonment, his gambling activities and his lack of character reformation outweighed any such hardship. Thus, the factors on which the Board relied in denying petitioner's application for suspension of deportation as a matter of discretion in 1976 were the same as many it has expressly stated should be taken into account in determining whether to exercise discretion in favor of an alien's application for relief under Section 212(c). In these circumstances, the Board acted reasonably in denying petitioner's motion to reopen in order to

apply for relief under Section 212(c) on the ground that it previously had denied an application for suspension of deportation under Section 244(a)(2) as a matter of discretion.

2. Petitioner contends (Pet. 14-18) that the Board erred in finding (Pet. App. 11a) that there had been no "significant changes of circumstances" since its January 20, 1976 decision denying his application for suspension of deportation. As the Board correctly noted (*id.* at 10a-11a), however, the only changed circumstance between its 1976 decision and the decision below was the passage of time, and the mere passage of time does not warrant a reopening absent a "significant change in a factor critical to the disposition of [the] case." [5]

Even before this Court, petitioner has identified no change in the circumstances of his case, other than the passage of time, that occurred between the Board's 1976 decision and the decision below. Petitioner relies instead (Pet. 15; Note to Petition) on a comparison of his case and other cases in which Section 212(c) relief was granted even though, peti-

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[5] Petitioner erroneously asserts (Pet. 17) that the Board cited *Carnalla-Munoz* v. *INS*, 627 F.2d 1004 (9th Cir. 1980), in support of the proposition that the mere passage of time does not warrant reopening of deportation proceedings. But the Board neither cited that case nor relied on the principle articulated therein (*id.* at 1006 n.3) to the effect that "post-deportation equit[ies]" are entitled to less weight than they otherwise would demand. In this case, the Board did not accord less weight to "equities" that arose either after the institution of deportation proceedings or after its January 1976 decision. Rather, the Board based its decision (Pet. App. 10a-12a) on the fact that petitioner could point to *no* additional factors that had arisen since the 1976 decision denying suspension of deportation.

tioner claims (Pet. 15), his case "for [Section] 212 (c) relief was stronger in almost every way than those cases in which relief was actually granted." In the first place, we note that, with one exception, all of the cases on which petitioner relies were decided prior to 1976 (see Note to Petition). Even this "factor" thus does not constitute a changed circumstance that occurred subsequent to the Board's prior decision. Moreover, petitioner's extensive criminal background and the absence of any genuine rehabilitation on his part (as evidenced by his recent convictions in two separate cases on charges of racketeering and fraud and conspiracy to bribe a federal official (see note 3, *supra*)) distinguish his case from the one 1976 decision he has cited. See *In re Tanori*, 15 I. & N. Dec. 566 (BIA 1976) (possession of marijuana for sale). In any event, in *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 264 n.5 (1954), this Court characterized as "wholly frivolous" the contention that the BIA abused its discretion in denying relief in one case simply because it had granted relief in similar cases. Hence, as the court of appeals concluded (Pet. App. 5a), in the absence of any explanation by petitioner of why the passage of time since the Board's 1976 decision constitutes a significant change in circumstances, the Board did not abuse its discretion in holding that the mere passage of time did not warrant reopening petitioner's deportation proceedings.

3. Petitioner finally contends (Pet. 19-20) that the Board erred in using a then pending indictment as a "wholly independent" basis for denying his motion to reopen. But the Board recognized that the indictment was only an "accusation" and did not use it as

evidence that petitioner had committed the alleged crimes. Rather, the Board merely stated (Pet. App. 13a) that since it already had denied discretionary relief to petitioner on a prior occasion, the fact that there were unresolved criminal charges pending against him was another factor casting doubt on whether he would be successful on the merits of his request for discretionary relief under 8 U.S.C. 1182 (c) if his deportation case were reopened. The Board was not required to close its eyes to the fact that petitioner was under indictment for serious charges. So long as the Board did not deem the indictment dispositive of the merits of those charges, it did not err in taking it into account when it ruled on petitioner's motion to reopen deportation proceedings.

In any event, even assuming it was error for the Board to consider the indictment then pending against petitioner, the error was harmless. The Board's reliance on the indictment constituted only one of two "wholly independent" grounds for the Board's denial of petitioner's motion to reopen. As we have shown above (pages 9-13, *supra*), the Board's first ground for denying petitioner's motion —its previous denial of discretionary relief under 8 U.S.C. 1254(a)(2), coupled with the absence of any significant change in circumstances since that decision—was neither arbitrary or capricious nor unsupported by the evidence. Moreover, we agree with the court of appeals (Pet. App. 6a) that any impropriety in the Board's taking account of the indictment was "mooted by the admitted subsequent circumstance that since the Board's hearing [petitioner] was convicted of the crime charged by that indictment as well as of another offense."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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